SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1942**

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# No. 579

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PACIFIC GAS AND ELECTRIC COMPANY (a corporation), *Petitioner,*

*vs.*

SACRAMENTO MUNICIPAL UTILITY DISTRICT, *Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### Opinions of Court Below.

A reference to the official opinions delivered in the courts below is set forth in the petition (p 5) and for brevity that reference is adopted here.

### II.

### Statement of Jurisdiction.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 5) and by this reference thereto is hereby adopted.

## III.

### Concise Statement of the Case.

A summary statement of the matter involved is given in the petition (p. 2) and to avoid duplication that statement is incorporated herein as a concise statement of the case.

## IV.

### Specifications of Errors.

The errors intended to be urged are those specified in the petition as the questions presented and numbered I and II (p. 6) which are specifically assigned as error.

## V.

### Summary of Argument.

Petitioner's argument herein may be summarized as follows:

1. As petitioner's right to bring the action which it brought in the federal courts and in which the attorneys' fees in question were incurred was conferred on it by section 2 of Article III of the Constitution of the United States and section 24 of the Judicial Code (Title 28, U. S. C. sec. 41), and as neither the Constitution nor laws of the United States impose on petitioner any liability to pay the defendant's attorneys' fees, no such liability can be created by state statute. It is immaterial that section 526b of the California Code of Civil Procedure (appended as footnote on page 2 of petition) purports to create an independent obligation on petitioner and an independent right in respondent, as the effect of such statute is to burden and penalize a right conferred by the Constitution and laws of the United States. The Supreme Court of California, in deciding that

such independent liability might be created by state law applicable alike to actions in the state courts and in the federal courts, has decided a federal question contrary to the applicable decisions of this Court (*Missouri P. R. Co.* v. *Larabee*, 234 U. S. 459, 58 L. Ed. 1398; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352) and a writ of certiorari should be granted by this court in order to fully protect the powers and jurisdiction of the federal courts and the right to freely resort thereto in all cases coming within their jurisdiction without fear of incurring the penalty imposed by said section of said Code.

2. As taxpayers generally may bring suit to enjoin the issuance and sale of bonds by public corporations without incurring any liability to pay the expenses incurred by such corporations for the hire of attorneys to defend such actions, it is a denial of the equal protection of the laws as guaranteed by the fourteenth amendment to the Constitution of the United States to impose such liability on a limited class of persons merely because they own property of the same character as that for which such bonds are proposed to be issued and sold. The Supreme Court of California, in deciding that because of their ownership of property of the same character as that for which a public corporation proposes to issue and sell its bonds private utilities might have more reason to bring groundless injunction suits for the purpose of delaying the acquisition of competing property by such public corporations and therefore for the purpose of preventing such actions private utilities may be denied the right to resort to the courts except at the risk of incurring a burdensome liability while other taxpayers may freely resort to the courts for injunctive relief without fear of incurring such liability, has decided a federal question contrary to applicable decisions of this Court and a writ of certiorari should be granted by this Court in

order to give full force and effect to the equal protection clause of the fourteenth amendment to the Constitution of the United States. (*Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79.)

## ARGUMENT.

### I.

**The State, for the purpose of deterring actions brought to enjoin the issuance and sale of bonds by a public corporation, may not, by creating an independent liability for costs and attorneys' fees, burden or impair the right to resort to the Federal courts in cases arising under the Constitution and laws of the United States.**

The opinions of the United States District Court and the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Pacific Gas and Electric Co.* v. *Sacramento Municipal Utility Dist.*, wherein the attorneys' fees in question were largely incurred, reported in 17 F. Supp. 685, 686, and 92 Fed. (2d) 365, 366, respectively, show that a serious question of constitutional law was presented under the fourteenth amendment to the Constitution of the United States. The United States District Court in its opinion at page 686 said:

> "No case by the United States Supreme Court dealing with the constitutional questions pertaining to a utility such as this, is to be found. For that reason the ultimate characterization of these taxes is open to some doubt but the court is satisfied that they are general."

The Circuit Court of Appeals of the Ninth Circuit in its opinion (92 Fed. (2d) at page 366) said:

> "The gravamen of the complaint is that the bonds would be a charge and a lien upon property in the district, including that belonging to plaintiff; that, unless

> restrained, the defendant will levy taxes upon plaintiff's property to meet the district's obligations under the bonds; that plaintiff's property will receive no benefit by reason of the proposed construction of the district's system, and is afforded no opportunity to present the question of benefit to the district or its officers, and hence to tax it without a hearing on the question of benefit is a taking of property without due process of law."

We submit that the petitioner had the right to bring such action in the federal courts under section 2 of Article III of the Constitution of the United States and section 24 of the Judicial Code (Title 28, U. S. C. sec. 41) without incurring any liability for costs, damages and expenses incurred by the defendant in such action other than the ordinary costs specified in sections 571 and 572 of Title 28, U. S. C. Section 571 of Title 28 U. S. C. provides:

> "The following fees and no others shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with the general usage in their respective states or may be agreed upon between the parties."

Section 572 of Title 28, U. S. C. provides a schedule of fees as follows:

> "On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20.00;"

It was stipulated herein (R. 8) that all costs incurred in the several courts of the United States by which the case was considered were taxed according to the rules of such

courts and were paid by the petitioner herein, but it is contended by the respondent and by the Supreme Court of California that the attorneys' fees for which judgment was rendered herein are not such costs as were taxable as such in the courts of the United States and therefore an independent liability for such fees may be created without conflicting with the laws of the United States. We submit that whether such fees are costs or an independent liability is immaterial because the imposition thereof on the unsuccessful party is contrary to the provisions of section 571 U. S. C. which clearly implies that any other fees must be charged to and received from the party for whom the services are performed.

Section 526b has been set forth in full in a footnote on page 2 of the petition. The Supreme Court of California held that this section created an independent civil liability against petitioner because petitioner brought an action to enjoin the issuance and sale of bonds by respondent and the injunction was denied. The Supreme Court concedes (R. 24) that the jurisdiction of the federal courts cannot be enlarged, diminished or impaired by state statutes or regulations and that a person may not be deprived of the right to resort to such courts by state legislation. However, it held said section valid because it does not purport to regulate or limit the jurisdiction of the federal courts but merely creates an independent liability which a litigant incurs if he chooses to litigate a question concerning the validity of such bonds; if a litigant elects to assert his rights he runs the risk of being required to reimburse his opponent for the latter's expenses. As no section of the Constitution of the United States or any of its laws impose any such liability as a condition to the right to bring actions in the federal courts, the question is, can the state create one for the purpose of deterring the bringing of injunction suits in order to determine questions arising under the Constitution and

laws of the United States. The Supreme Court of California concedes that no law may be enacted which attempts to directly limit the jurisdiction of the federal courts or the right of a person to resort thereto, and the question that is presented herein is whether the state may do indirectly that which it admits it cannot do directly by creating independent liability which by reason of the magnitude of the liability may be as effective as a prohibitive statute enforced by a criminal penalty or forfeiture of rights.

Numerous decisions of this court, only a few of which will be referred to, have held that the right to resort to the courts of the United States in matters within their jurisdiction may be freely exercised by all, and it is no answer to this unqualified right to say that if a plaintiff in a case arising under the Constitution and laws of the United States "chooses to litigate the question, he runs the risk of being required to reimburse his opponent for the latter's expenses." We submit there is no difference between a forfeiture of a person's property and the imposition of a liability by which his property may be taken on execution.

In the case of *Home Insurance Company of New York* v. *Morse*, 20 Wall. 445, 454, 22 L. Ed. 365, 368, 369, this court said:

> "Every citizen is entitled to resort to all the courts in the country, and to invoke the protection which all the laws or all those courts may afford him."

After referring to the provisions of Article III, section 2, of the Constitution of the United States, the court said:

> "The jurisdiction of the Federal Courts, under this clause of the Constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal Courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution."

These plain statements of the law were made by this court concerning the question of the right to remove a case to the federal courts on the grounds of diversity of citizenship. Such right is conferred by the same section of the United States Constitution which conferred on petitioner its right to bring in the federal courts the action wherein the attorneys' fees here in question were incurred.

In the *Morse case* the court was considering a Wisconsin statute which required a foreign corporation as a condition to its doing business in the state to agree that it would not remove any suit for trial into the federal courts. The court held that the foreign corporation could not be compelled to barter away its rights in advance.

In the case of *Harrison* v. *St. Louis & S. F. R. Co.*, 232 U. S. 318, 328, 58 L. Ed. 621, where the State of Oklahoma, under a state statute providing for a forfeiture of its certificate to do business in the state, attempted to revoke the charter of the railroad company because it removed a suit brought against it to the federal courts, this court said:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious."

If the right to remove a case to the federal courts may not be denied or punished by state action, the right to bring in the United States courts an action arising under the Constitution or laws of the United States may not be penalized or punished by the creation of an independent liability for expenses and attorneys' fees when no such liability is provided by the laws of the United States.

It was held by this court in the case of *Cowles* v. *Mercer County*, 7 Wall. 118, 19 L. Ed. 86, that states cannot, by their

laws, limit the right to sue their public corporations to their own courts and thereby prevent actions being brought against such corporations in the courts of the United States.

In the case of *Chicago & N. W. R. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35, 47, 67 L. Ed. 115, 124, the court said:

> "Penalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the 14th Amendment. Missouri P. R. Co. *v.* Tucker, 230 U. S. 340, 57 L. ed. 1507, 31 Sup. Ct. Rep. 961. While the present case does not involve any such penalties as were there imposed, we think the principle applies to the facts of this case. We hold that so much of the statute as imposed an attorney's fee upon the carrier in this case in the Supreme court was invalid."

The right to appeal to the Supreme Court of the United States from a decision of the highest court in this state is based on the same section of the Constitution that was invoked in the case in the federal courts wherein the attorneys' fees here in question were incurred and that question was presented to and decided by this court in the case of *Missouri P. R. Co.* v. *Larabee*, 234 U. S. 459, 468, 58 L. Ed. 1398, where a dispute arose between the railway company and Larabee over the payment for certain switching service. The railway company discontinued the service to enforce payment and Larabee brought a mandamus proceeding in the Supreme Court of Kansas to compel the restoration of service. From a judgment against it the railway company appealed to the Supreme Court of the United States where the judgment was affirmed. Larabee, under a Kansas statute which provided that attorneys' fees might be recovered in such actions, then presented in the Supreme Court of Kansas an itemized bill of costs, among which were counsel fees and expenses incurred in de-

fending the case in the Supreme Court of the United States. Upon the allowance of these fees and expenses by the Kansas court, the case was again appealed to the Supreme Court of the United States. While the Supreme Court upheld the judgment for the attorneys' fees incurred in the state courts, it struck from the judgment the attorneys' fees incurred on the appeal to the Supreme Court of the United States. That court said:

> "There can be no doubt that, tested by the general principles of law controlling in this court, by the statutes of the United States relating to the subject, or the rules of this court concerning the same, the award for the attorneys' fees in question was absolutely unwarranted. * * *
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> "The question is, then, was the court below right in holding that it had power, because the Kansas statute so authorized to assess as against one party to a suit in the Supreme Court of the United States a sum for attorneys' fees for services rendered in that court as against another party to the suit although such assessment, as we have seen, was not authorized by the law of the United States, but was in conflict with the settled rule in the Supreme Court of the United States?
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> "It seems superfluous to put the question, since its very statement conveys of necessity a negative answer. For how, on the face of the question, consistent with the most elementary principles of our constitutional system of government can it be possibly assumed that a state statute could be made operative in the Supreme Court of the United States to the disregard of its settled rule of procedure and of the principles which had guided its conduct from the beginning directly sustained by express rule adopted under the sanction of Congress?
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> "It would follow, of course, that the right to freely seek access to the Supreme Court of the United States would cease to exist since it would be in the power of

> the state to burden that right to such a degree as to render its exercise impossible."

We think the *Larabee case* is controlling here, and in affirming the judgment for attorneys' fees incurred in the federal courts the Supreme Court of California has decided a federal question contrary to the applicable decisions of this court as above shown.

The cases of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Sioux County* v. *National Surety Co.*, 276 U. S. 238, relied on by the Supreme Court have no application for the reason that while the statute in question purports to create a substantive right, which right if otherwise valid might be enforced in the federal courts, such state law cannot be given effect when its effect is to burden and penalize the right to resort to the federal courts in asserting rights arising under the Constitution and laws of the United States.

On this ground we respectfully submit that this court should grant the writ of certiorari and reverse the judgment of the Supreme Court of California.

## II.

**It is a denial of the equal protection of the laws to impose on petitioner a liability for attorneys' fees merely because it owned property of the same character as that for which respondent proposed to issue and sell its bonds while other taxpayers who do not own such property might bring the same kind of action without incurring the risk of any liability.**

The District Court of Appeal, in its opinion reversing the judgment of the Superior Court, said (R. 21):

> "All parties seem to agree that this section was enacted as a deterrent upon litigation, with the obvious purpose of discouraging a certain litigant from resorting to legal process in the assertion and protection of

his rights. No distinction is made in the statute between actions commenced in good faith and those filed for the purpose of harassing the other party. Practically all suits for injunctive relief result in delaying some action which the defendant is about to take, and the situation here is not peculiar to public corporations. There is no legal distinction between public and private patience.

"We are of the opinion that the rule quoted above from Builders' Supply Dept. v. O'Connor, must govern the consideration of the statute we are here contemplating. No sound or valid reason can be advanced for the classification. The enactment definitely violates the fourteenth amendment of the Federal Constitution, and also the provisions of sections 11 and 21 of the Constitution of California."

The burdensome inequality of the statute in question was conceded by both the District Court of Appeal and the Supreme Court. The former held the statute invalid because there was nothing to indicate that suits to enjoin the issuance and sale of bonds are nuisance lawsuits, but the latter held that the legislature might have assumed that interest in delaying injury to the business of the private utility afforded a sufficient basis for discriminating against it in the exercise of a right which may be freely exercised by all.

In accordance with the rule announced by this court in the case of *Home Insurance Company* v. *Morse, supra,* and reiterated in many subsequent decisions by it that "every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him," the Supreme Court of California held in the case of *Asevado* v. *Orr,* 100 Cal. 293, 297:

"The courts of the state are open to every citizen for the redress of his wrongs, and unless he is at liberty to seek such redress without rendering himself

> liable in damages to the defendant, in case he shall fail to establish his complaint, this right would in many instances be a barren privilege."

In the case of *Black* v. *Hilliker,* 130 Cal. 190, 193, the Supreme Court of California said:

> "It is contrary to the general policy of the law that a plaintiff who is unsuccessful in his suit shall be mulcted in damages merely by reason of his failure to obtain judgment. * * * Even in cases in injunction the defendant is not permitted to recover, as part of these damages, the fees paid to his attorney for defending the action;"

These declarations have been the law of California for more than fifty years. While the legislature may change the general rules of law, may it change it as to a small class of litigants arbitrarily selected because they may have more reason for bringing such litigation? The Supreme Court of California says that because a private utility distributing electricity in the same area is without legal redress for the injury that might be done to its business by the competition of a municipality or public agency engaging in the same business, the legislature might assume that such private utility would be naturally driven by a compelling motive different and greater than other persons to prosecute litigation to hamper and interfere with the operation of such municipality or public agency and that this temptation affords sufficient basis for applying a different rule to private utilities than is applied to other taxpayers who might bring the same kind of actions for the purpose of preventing bonds from becoming liens on their property. The court said (R. 31):

> "It is no answer to this circumstance to assert that private utilities do not prosecute actions of this character more frequently than others, inasmuch as the legislature's determination that because of the motive

> involved the probabilities that they would prosecute more of such actions is binding upon this court where it has some reasonable basis for such determination."

The Supreme Court of California concedes the fact which was brought to its attention that many more such cases appear in its own records to have been brought by others than private utilities. It nevertheless by speculation as to the motive of the legislature assumed that it determined that all actions brought to enjoin the issuance and sale of bonds by a public corporation if unsuccessfully brought by a private utility were nuisance lawsuits. The argument is entirely fallacious. It may well be assumed that every action is brought by a person having some interest in bringing it and some motive for doing so, and if every person having an interest in bringing a suit may be deterred from so doing through fear of liability for damages in case he fails in his action, the challenge of every action may be effectually prevented. The District Court of Appeal, in its opinion, said (R. 16):

> "We do not believe there is any substantial basis for the assumption that all or many of such actions are 'nuisance lawsuits'. No evidence is presented which would afford the basis for a conclusion or finding to that effect. On the contrary, in all dealings, whether between individuals, or between public corporations and public utilities, the presumption of fair dealing obtains. If the law was designed to penalize vexatious litigation, it should have provided, as a basis for recovery, that plaintiff must prove that the action was, in reality, not commenced in good faith, but with an ulterior purpose in view. In the absence of such proof we cannot conclude that the action for the injunction was commenced for any reason other than to protect and preserve the rights of the plaintiff therein."

This court in the case of *Ex Parte Young*, 209 U. S. 123, 146, 52 L. Ed. 714, 723, quoting from the opinion of Mr.

Justice Brewer in the case of *Cotting* v. *Kansas City Stockyards Co.*, 183 U. S. 79, said:

> " 'But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in courts that the party affected is necessarily constrained to submit rather than take the chance of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.' "

As this court has stated on many occasions, the question of whether there is a denial of equal protection of the laws depends on whether the statute, rule or conduct is shocking to the sense of fair play. The fact that the penalty is imposed only upon a small class which without any finding as to the good or bad faith the court assumes might have an interest in bringing injunction suits to challenge the acts or conduct of a state agency would seem sufficiently shocking to invoke the protection of this court. It may be reasonably assumed that no person brings a lawsuit unless he has some interest in doing so, and if he may be classified separately and penalized merely because of such interest then the testing of every question of public law may be effectually prevented by imposing a penalty or a civil liability upon the person who might have sufficient interest in it to oppose and challenge it. Had the injunction suit been brought by a railroad company, telephone company or other taxpayer, no liability for the defendant's attorneys' fees would have resulted because they do not own an electric distribution system, yet the Supreme Court upheld the imposition of a liability on petitioner because it might be injured by competition against which it had no legal redress.

In the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, the court said:

> "The equal protection of the laws is a pledge of the protection of equal laws."

It would seem obvious that the pledge of the protection of equal laws is violated in the instant case by a statute which imposes a penalty upon the class of persons who because of interest might be most likely to challenge the acts of the state or of public corporations created by it.

In the case of *Barbier* v. *Connolly,* 113 U. S. 27, 28, this court said concerning the effect of the fourteenth amendment:

> "That they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the presence of anyone except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling."

In the case of *Truax* v. *Corrigan,* 257 U. S. 312, 337, 66 L. Ed. 254, 265, where it was dealing with an Arizona statute which imposed burdensome conditions as a prerequisite in the granting of an injunction in a labor case and thereby created an immunity from injunctive actions similar to the immunity which section 526b attempts to create in favor of public corporations, this court said:

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of or the deprivation of right permitted worked against, a larger class."

In the case of *Builders' Supply Depot* v. *O'Connor,* 150 Cal. 265, where the court was considering the validity of a mechanic's lien statute which allowed the lien claimant an attorney's fee if successful but did not allow the defendant therein such fee if he were successful, it said:

"It will be seen that this section imposes a penalty upon the defendants for exercising in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorney's fees if he is unsuccessful, without giving him, the defendant, a reciprocal right if he is victorious."

"Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as fixed as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property."

"Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law."

We submit the decision of the Supreme Court of California in the instant case denies to petitioner the equal protection of the laws and is in conflict with the foregoing decisions of this court.

**Conclusion.**

In conclusion we submit that in the instant case section 526b of the California Code of Civil Procedure imposes a burden upon the exercise of a right conferred on petitioner by the Constitution and laws of the United States which is beyond the power of the state to impose; that it denies to petitioner the equal protection of the laws as guaranteed by the fourteenth amendment to the Constitu-

tion of the United States and the Supreme Court of California in holding said section valid and affirming the judgment herein has erroneously decided substantial federal questions contrary to applicable decisions of this court and certiorari should be granted by this court to correct such errors, and upon a hearing thereof the judgment against petitioner should be reversed.

Respectfully submitted,

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